No. 86-1420

In The
Supreme Court of the United States
October Term, 1986

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

RUSSELL M. LAHTI,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

JOSEPH T. DOYLE, JR.
Attorney for Respondent,
RUSSELL M. LAHTI
Counsel of Record
LECOMTE, BARBER, EMANUELSON,
TICK & DOYLE
One Boston Place
Boston, MA 02108
Tel. No. (617) 723-3100

On the Brief
WILLIAM P. SMITH
LECOMTE, BARBER, EMANUELSON,
TICK & DOYLE
One Boston Place
Boston, MA 02108
Tel. No. (617) 723-3100

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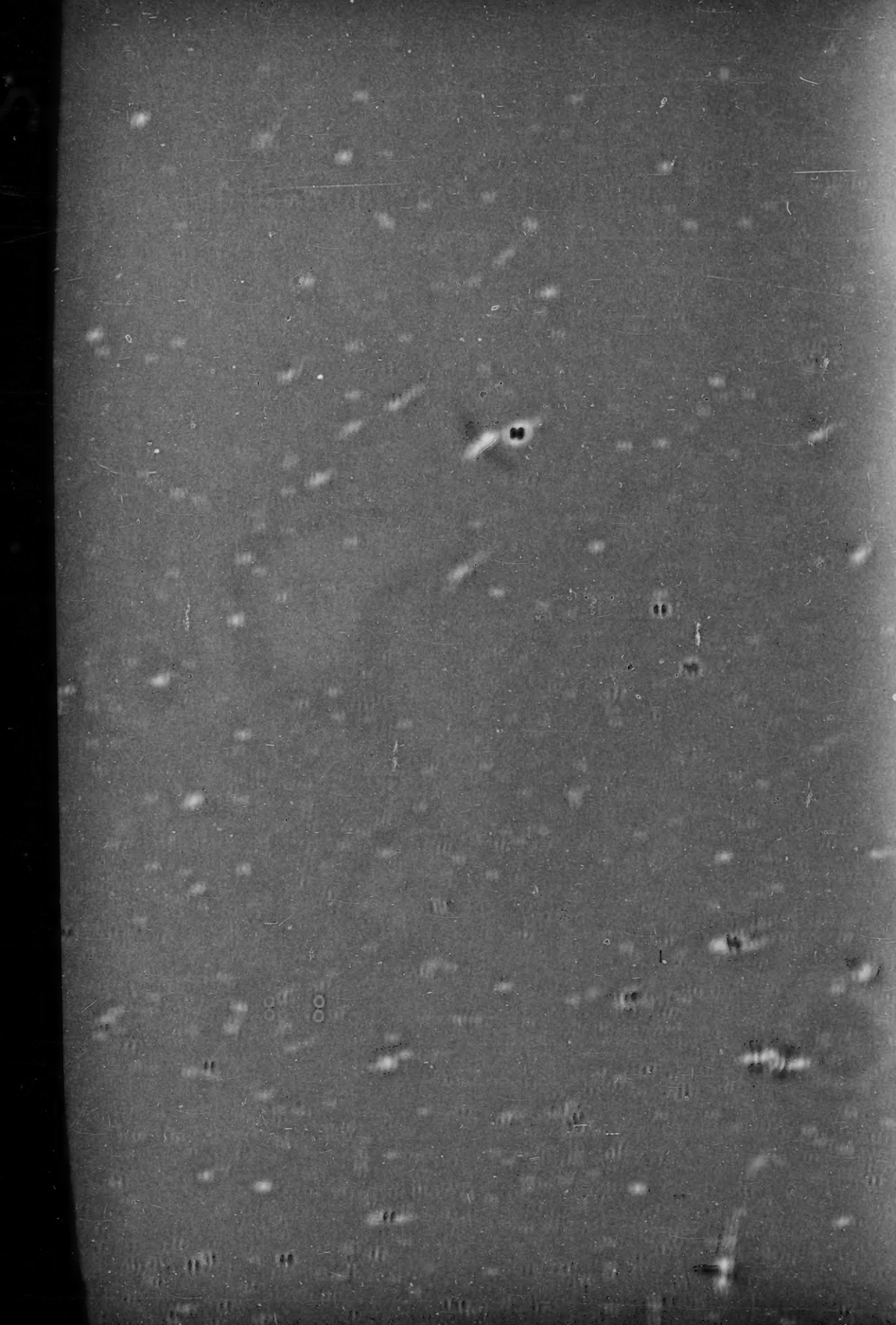

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COUNTERSTATEMENT OF THE CASE

The Commonwealth's Statement of Facts in its Petition For Writ Of Certiorari is essentially accurate; however, certain additional facts found by the Courts below must be recognized.

The very existence of the crimes charged and identities of the victims/witnesses whose testimony has been suppressed was unknown to the police prior to the defendant's involuntary statements. (App. 5C).[1] "Prior to the extraction of the defendant's confession, the children had said nothing about the alleged abuse, and their silence probably would have continued on indefinitely, but for the illegally obtained confession which ultimately brought about the questioning by the mother." (App. 16C). Finally and most importantly, the Courts below found that "the police deliberately and intentionally extracted the identities of these witnesses/victims from the defendant." (App. 20C).

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1. References are to the Appendix filed by the Commonwealth with its Petition for Writ of Certiorari.

ARGUMENT

I. THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT

A. The Court Below Applied The Proper Constitutional Tests As Expressed In United States v. Ceccolini In Affirming The Suppression Of The Victims/Witnesses Testimony.

It is well established that evidence derived from a violation of a Defendant's Constitutional rights may be suppressed as "fruit of the poisonous tree." *Wong Sun v. United States,* 371 U.S. 471 (1963). Once the initial illegality has been determined, the burden shifts to the government to prove either that the derivative evidence was discovered through a source independent from the illegality or that the connection between the illegality and the discovery of the challenged evidence has "become so attenuated as to dissipate the taint." *Id.* at 487. The leading decision of this Court on the issue of whether the whole testimony of a live witness should be suppressed as "fruit of the poisonous tree" is *United States v. Ceccolini,* 435 U.S. 268 (1978). Contrary to the Commonwealth's argument in its Petition for Certiorari, this Court has not held that a different analysis should be applied in the Fifth Amendment context than has historically been applied to "fruit of the poisonous tree" issues in the Fourth Amendment context and no logical basis exists to support such a distinction. *See Nix v. Williams,* 467 U.S. 431, 442 (1984). The Supreme Judicial Court of Massachusetts in the decision below properly applied the considerations enunciated by this Court in *United States v. Ceccolini,* supra, and the decision below is not in conflict with any decision of this Court on the present issue.

In *Ceccolini,* this Court rejected a per se rule proffered by the government that the testimony of a live witness should always be admissible at trial no matter how close and proximate the connection between it and a violation of the Constitution. 435 U.S. at 274-275. Rather, this Court reaffirmed the holding of *Wong Sun* that the issue is whether the testimony of the live witness derives so immediately from the initial constitutional violation as to be considered fruit of the poisonous tree or is sufficiently attenuated to dissipate the taint. 371 U.S. at 275.

Although this Court in *Ceccolini* acknowledged that "the exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object." *Id.* at 280; it did not hold that the sole or overriding factor to be considered is the voluntariness of the testimony. In fact, this Court stressed that even voluntary testimony may be excluded where it is "induced" by unlawful police conduct or where the police misconduct is designed " . . . with the intent of finding a willing and knowledgeable witness to testify . . ." against the defendant. *Ceccolini,* 435 U.S. at 279-280. Unlike the circumstances present in *Ceccolini,* the courts below found that the very existence of the crimes charged and the identities of the victim/witnesses were unknown to the police prior to the defendant's involuntary statements (App. 5C) and "the police deliberately and intentionally extracted the identities of these witnesses/victims from the defendant,"

(App. 20C). This case presents the very facts postulated by Justice Rehnquist in footnote 4 of the *Ceccolini* opinion, 435 U.S. at 276, and the decision below properly held that the decisions of this Court compel the exclusion of the witnesses/victims testimony under these circumstances.[2]

B. The Testimony Of The Victims/Witnesses Was Not Obtained By Any Source Independent Of The Illegality; But Rather Was The Direct Result Of Deliberate Police Misconduct.

Contrary to the Commonwealth's argument, this Court has never held that different standards apply to the "fruit of the poisonous tree" analysis in the context of the Fifth Amendment as opposed to the Fourth Amendment. Rather, the "independent source" doctrine is merely an alternative line of analysis to the "attenuation" analysis applicable in all situations whereby evidence may be admissible if it is derived from a source wholly independent of the Constitutional violation. As noted in the decisions below, the Commonwealth did not argue that the victims/witnesses testimony were admissible under the "independent source" doctrine and its attempt to raise this argument for the first time before this court is untimely. In any event, the facts found below clearly establish that the "independent source" exception is not applicable to the instant case.

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2. In upholding the admission of testimony at issue in Ceccolini, Justice Rehnquist writing for the Court, stressed in footnote 4 that: "Of course, the analysis might be different where the search was conducted by the police for the specific purpose of discovering potential witnesses." Id. at 276, n.4.

The "independent source" exception has its roots in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). In *Silverthorne Lumber*, this Court held:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court *but that it shall not be used at all.* Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any other. . . . *Id.* at 392. (Emphasis added.)

The Trial Court found that the very existence of the crimes charged and identities of the victims/witnesses whose testimony has been suppressed was unknown to the police prior to the defendant's involuntary statements. (App. 5C). The Trial Court further found that:

> Prior to the extraction of the defendant's confession the children had said nothing about the alleged abuse, and their silence probably would have continued indefinitely, but for the illegally obtained confession which ultimately brought about the questioning by the mother. (App. 16C)

Finally, in holding that the victims/witnesses testimony was induced by police misconduct, the Trial Court found that:

> The officers must have realized, and certainly it is plain to this Court, that their intervention could and did trigger a chain of events that would produce a victim/witness willing to press charges and testify against the defendant. (App. 16C).

In light of these factual findings, the Commonwealth's present argument that admission of the testimony can be

justified by the "independent source" exception to the exclusionary rule is incredulous.

Cases cited by the Commonwealth in support of its "independent source" rationale do not help its position. The cases of *Murphy v. Waterfront Comm's of New York Harbor,* 378 U.S. 52 (1964) and *Kastigar v. United States,* 406 U.S. 441 (1972) addressed the circumstances under which testimony could constitutionally be compelled under a grant of immunity and are not at all on point. Notwithstanding this distinction, *Kastigar* actually reaffirmed the principle that information obtained from a defendant through a statement under a grant of immunity cannot be used in any respect and must not be used to seek out other evidence and witnesses to be used against the defendant. 406 U.S. 453, 459-461. The implication is that the rule would be the same for information obtained through a violation of Fifth Amendment Rights.

The case of *United States v. Crews,* 445 U.S. 463 (1980), upon which the Commonwealth principally relies, actually supports suppression in the instant case. The decision in *Crews* reveals that the decisive factors to support admission of evidence were that the police were aware of both the existence of the crimes and identities of the victims and had reason to suspect the defendant prior to and independent of the Constitutional violation. *Id.* at 471-472. In contrast, the trial court in the instant case specifically held that the police had no knowledge of the existence of the crimes charged or the identities of the victims/witnesses prior to or independent of the illegality. (App. 5C). This court in *Crews* took great pains to

distinguish that case from a situation " . . . in which the defendant's identity and connection to the illicit activity were only first discovered through [a constitutional violation] . . . ." *Id.* at 475 and the clear import of that rationale is that suppression is appropriate in such a case.

CONCLUSION

This case falls squarely within the facts set forth by Justice Rehnquist in footnote 4 of the *Ceccolini* decision, where the illegal conduct was specifically designed to discover potential witnesses, and the Courts below correctly applied the decisions of this Court in suppressing the evidence. For the aforementioned reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

/s/ JOSEPH T. DOYLE, JR.
JOSEPH T. DOYLE, JR.
Attorney for Respondent,
RUSSELL M. LAHTI
Counsel of Record
LECOMTE, BARBER, EMANUELSON,
TICK & DOYLE
One Boston Place
Boston, MA 02108
Tel. No. (617) 723-3100

Dated: March 30, 1987

On the Brief
WILLIAM P. SMITH
LECOMTE, BARBER, EMANUELSON,
TICK & DOYLE
One Boston Place
Boston, MA 02108
Tel. No. (617) 723-3100